Honorable Richard A. Jones
Note for Consideration:
August 24, 2012

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

THE STILLAGUAMISH TRIBE OF INDIANS, a federally recognized Indian Tribe, Plaintiff, v. DAVID L. NELSON and MICHELE NELSON, et. al. Defendants.	NO. 2:10-cv-00327 RAJ **NELSONS' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

In the interest of judicial economy and to avoid redundancy, Defendants Nelson incorporate by reference the Reply filed by Defendant Chapman. These defendants will leave it to Defendant Chapman to address the topics contained in his Reply.

II. ARGUMENT

Dismissal of the RICO claims is warranted for two reasons. First, the claims are all time barred. Second, based on the evidence of record, which evidence Plaintiff has failed to rebut, Plaintiff is acting in its *parens patriae* capacity. Under Ninth Circuit law, a governmental entity acting as Plaintiff is acting here, cannot claim to have been injured in its business or property. Simply, STOI has no right to bring its RICO claims.

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A. THE RICO CLAIMS ARE ALL TIME BARRED.

i. The Law. RICO claims are all governed by a four year statute of limitations. *Agency Holding Corp. v. Malley-Duff & Associates, Inc*., 483 U.S. 143, 146, 107 S. Ct. 2759, 2762, 97 L. Ed. 2d 121 (1987). The claim accrues when the party claiming injury learns, or in the exercise of reasonable care, should have learned, that it had been injured. *Rotella v.* Wood, 528 U.S. 549, 120 S.Ct. 1075 at 1083, ___L.Ed 2d ___ (2000). The claim will accrue, and the statute begin to run, even if the injured party does not yet know the scheme through which it suffered harm. Instead, accrual of the claim triggers a duty to investigate. *Id.* at 1082-1083. Where the injury is the result of a series of actions (the pattern of racketeering activity), the claim accrues when the injury is first discovered, and not when the last act occurred. *Id* at 1080-1081. Constructive notice of a RICO claim starts the statute of limitations clock regardless of any fiduciary relationship between the injured and the wrongdoer. If reasonable minds cannot differ about whether the plaintiff had constructive notice of its injuries, defendants are entitled to judgment as a matter of law. *Pincay v. Andrews*, 238 F.3d 1106 at 1109 (9th Cir. 2001). The undisputed evidence in this case supports the conclusion that the statute of limitations on each of the RICO claims accrued more than four years before STOI filed this action. For this reason, the court should grant this motion and dismiss the Second, Third and Fourth Claims.[1]

ii. The Smoke Shop Claim. The gravamen of the first claim is that Defendants Goodridge and Schroedl ("Tribal Officers") used their positions of power on the STOI Board of Directors to claim the smoke shop for themselves rather than to make it a tribal enterprise. STOI claims damages of $15 million due to the Tribal Officers' usurpation of the Tribe's

[1] The First claim is not against Defendants Nelson, though the allegations are incorporated by reference in the balance of the third amended complaint. However, for the same reasons that the second, third and fourth claims should be dismissed, so too should the first claim, at least to the extent it purports to include Nelson.

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opportunity, "to legally operate the smoke shop from 2003 through 2009." (STOI Opposition, Dkt 341 at ¶ 8).

Defendants Nelson and Chapman are alleged to be conspirators with the Tribal Officers because they, respectively, loaned Goodridge, Sr. and Goodridge, Jr. the funds to capitalize Native American Ventures. The Tribe argues that Nelson and Chapman's roles were only discovered well after it began its post-ATF raid investigation in 2007. The Plaintiff has failed to offer any relevant, competent, evidence to rebut the accrual of this claim in 2003.

The unrebutted evidence is as follows: (a) STOI issued a business license to NAV in March 2003;[2] (b) Members of the Tribe knew that the Tribal Officers owned the Blue Stilly Smoke Shop. In fact, Yanity considered becoming a part owner in the shop (Yanity Dep.72:15-73:17);[3] (c) at least one director saw the Tribal Officers' actions as improper because NAV's operations deprived the Tribe of the shop's profits (Soholt 30(b)(6) Dep 22:20-23:25);[4] (d) STOI signed a lease with NAV, which was approved by the Bureau of Indian Affairs.[5]

STOI's sole argument for avoiding dismissal is its claimed ignorance of: (a) Nelson and Chapman's loans; (b) its ignorance of the three limited liability companies, owned by the Tribal Officers, which owned NAV and (c) NAV's dealing in contraband cigarettes. STOI contends that since it did not learn these facts until the 2007 ATF raid, the statute of limitation did not begin to run until then. Plaintiff is wrong.

Plaintiff alleges it lost profit due to NAV's operation of Blue Stilly. Nelson and Chapman's funding NAV's start-up is irrelevant to the *harm* allegedly suffered. The alleged

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[2] Shafer Supplemental Declaration, Exhibit 1.
[3] Shafer Supp. Dec., Exhibit 2.
[4] Shafer Supp. Dec., Exhibit 3.

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harm arose, not from the alleged conspiracy, but from NAV's operating the shop. Had the Tribal Officers self-funded NAV's start up, STOI's claim would, presumably, be the same.

Likewise, ownership of NAV is immaterial. This fact does not affect STOI's knowledge of the harm it allegedly suffered, which fact is the trigger for the statute of limitations. The facts of ownership only go to when STOI learned the elements of the "scheme."

Finally, even if the tribe did not know that NAV was selling contraband cigarettes and laundering funds through the three limited liability companies, this fact is also irrelevant for two reasons. First, under *Rotella*, STOI did not have to know the particulars of the cause of harm. Second, Plaintiff does not allege it has lost any *tax revenue* due to the sale of contraband cigarettes. Instead, it claims lost *profit* by not being permitted to operate the shop. These are the damages which the Tribe knew about from the minute it took the actions necessary to enable NAV to operate the business. Those actions occurred in 2003. That is when the statute began to run. The second claim is, therefore, time barred. The court should dismiss it.

iii. The Methadone Clinic Claim. In like manner, STOI knew all it needed to know about IC Holdings' (ICH) funding the methadone clinic start-up before its loan from ICH closed. Shawn Yanity testified that he, and others, questioned Goodridge, Jr. about why the tribe was paying 5 times the loan amount to ICH (Yanity Dep 99:3-99:11). He raised this question before STOI borrowed the money. The loan was made in 2003 or 2004. STOI knew about it then. That is when this claim accrued and the four year statute began to run.

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[5] Shafer Supp. Dec., Exhibits 4 and 5.

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STOI contends more conventional financing was available to it, if Goodridge had only looked. This is argument, not evidence. The only *evidence* of record is Goodridge's testimony.[6] He testified that he spoke with the bank and pursued grants. Both avenues were unavailing. STOI has offered nothing to refute Goodridge's testimony or support its argument that conventional financing existed. Even if this fact is true, it is immaterial to the statute of limitations question. The trigger is knowledge of harm, not incidental, tangential, facts.

The only relevant question is whether the Tribe knew enough to know that it was being harmed by a loan it describes as predatory. Yanity's testimony answers this question affirmatively. He knew the cost of ICH's funds and questioned the same. The Third Claim is time barred. The court should dismiss it.

iv The Real Estate Transactions Claims. STOI contends the twenty three transactions identified in TAC ¶¶3.53(a) through (w) were part of the grand plan concocted by the Goodridges, Nelson and Chapman. As with the Second and Third Claims, the four year statute of limitations on this claim began to run when STOI first knew, or should have known, that it overpaid for the 23 properties.

While Yanity's self-serving declaration disingenuously professes ignorance of the facts of these transactions (Yanity Declaration, ¶11), his deposition testimony proves otherwise. For example, at page 187:9-15,[7] Mr. Yanity testified,

> Q: Would it be fair that purchases of properties were always discussed before the properties were purchased?
>
> MR. SMITH: Objection, form.
>
> Q. Or the board had to approve it?

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[6] Shafer Declaration (Dkt #321), Exhibit 2, 113:7-18.
[7] Shafer Supp. Dec., Exhibit 2.

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A. Yeah.

At 218:7 through 219:11, Mr. Yanity described the process by which STOI bought land.

Q. At the time that you were presented the documents that are contained in Exhibit 53, can you explain the sequence as to whether or not the board had already approved the purchase of this property or not?

A. From my recollection, we had already purchased -- you can't sign the purchase and sale until it's passed by the board of directors, so we would have passed it before signing it.

Q. Okay. You are familiar with the term "resolution;" is that correct?

A. Correct.

Q. Does the board with regard to real estate transactions such as the Dreyer transaction get some type of resolution for the board to consider?

A. Yes, we would.

Q. So would the board, in sequencing, would a resolution with regard to the purchase of the Dreyer property be presented to the board? When would it be presented to the board in sequence to you signing Exhibit 53?

A. It would come to the board after Eddie and whoever finalized the agreement on the purchase of the property to take to the board and request resolution to purchase the property.

Q. And after there is a request to purchase the property, then do you sign the documents such as Exhibit 53?

A. After the resolution has passed, we would sign it.

Q. Would you ever sign documents, such as Exhibit 53, for the purchase of real estate before a resolution had been passed by the board?

A. I hope I didn't, but no, I don't believe I would.

The foregoing proves Yanity's declaration is a sham. Where a party attempts to create an issue of fact by submitting an affidavit that contracts prior deposition testimony,

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the court should disregard the declaration testimony. *Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc*., 397 F.3d 1217, 1225 (9th Cir. 2005) ["Under our 'sham' affidavit rule, 'a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony' "].

Nelson moves that the Yanity Declaration be stricken from the record under the sham affidavit rule.

Plaintiff contends that Goodridge's knowledge is not imputed to the Tribe because Goodridge had no actual or apparent authority to act. STOI is wrong. On May 24, 2005, Shawn Yanity signed a letter verifying that Goodridge, Jr. had authority to act for STOI in real estate matters.[8]

Further, Goodridge, Jr. was STOI's Executive Director. He was responsible for buying land. (Yanity Dep. 171:18-172:12).[9] Goodridge, Jr. had actual authority to do what he did. The tribe, as principle, is charged with Goodridge's knowledge. *Goodman v. Boeing Co*., 75 Wn. App. 60, 85, 877 P.2d 703, 717 (1994) aff'd, 127 Wn.2d 401, 899 P.2d 1265 (1995 [knowledge of the agent will be imputed to the principal where it is relevant to the agency and the matters entrusted to the agent].

Plaintiff contends the imputed knowledge rule does not apply because Goodridge was pursuing his personal interest. This is a mere argument unsupported by any evidence. Where, as here, the moving party presents evidence sufficient to make its prima facie case, the burden shifts to the opposing party to do more than rebut with a simple denial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). That party must present competent evidence to establish an issue of material fact. *Id.* at 2554. Plaintiff has failed to do so. Absent evidence that Goodridge personally benefitted from the

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[8] Shafer Supp. Dec., Exhibit 6.

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real estate transactions at STOI's expense, the court must impute Goodridge's knowledge to his employer.

The record shows STOI had information from which it should have concluded that its purchase prices were higher than assessed values. STOI had this information as early as 2002 on the Barlond purchase because the assessor's information was included with the purchase agreement.[10] Contrary to STOI's historical revision, Nelson and Chapman advised plaintiff of property values on every one of the 22 transactions at issue.[11] Defendants attached Assessor web pages to the purchase agreements. STOI received copies of title reports which also showed assessed values. Finally, where the bank financed a purchase, it received copies of the bank appraisals. With few exceptions, Exhibits 1 through 23 to the Nelson Declaration come from STOI's files, as evidenced by the Plaintiff's bates stamp numbers on them.

Nelson submits that the statute of limitations on the real estate RICO claim (Fourth Cause of Action) began to run no later than 2005, when STOI placed the Barlond property into trust. By then it had also acquired the Oberg and Herdt properties.[12] While Plaintiff contends this evidence raises issues of material fact about when the Tribe should have known it was being harmed, it is mistaken. Where reasonable minds can come to but one conclusion, the court can find an absence of material fact as a matter of law. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450, 96 S. Ct. 2126, 2133, 48 L. Ed. 2d 757 (1976) [in securities fraud action, where reasonable minds cannot differ on the question of materiality, the court may resolve that as a matter of law.] That is the case here. The court should rule as a matter of law that STOI knew, or should have known, it was paying more than assessed

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[9] Shafer Supp. Dec., Exhibit 2.
[10] Nelson Declaration, Exhibits 1 and 1-2 (Dkt #298).
[11] STOI has since dropped the claim regarding Brenner, TAC¶ 3.53(u).

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value at the time it purchased the 22 parcels. Its agent (Goodridge) had actual knowledge of every aspect of these transactions. That knowledge is imputed to STOI. The fourth claim therefore accrued no later than 2005. It is time barred. The Court should dismiss it.

v. No Basis Exists to Toll the Statute of Limitations. The equitable tolling doctrine, including fraudulent concealment, applies in civil RICO cases. *Grimmett v. Brown*, 75 F.3d 506 at 514 (9th Cir. 1996). To invoke the doctrine, the plaintiff must present evidence of affirmative conduct by the defendant which would, under the circumstances of the case, have led a reasonable person to believe that he did not have a claim for relief. Equitable tolling due to fraudulent concealment is only available where the plaintiff demonstrates it has exercised reasonable diligence in investigating the source of damages identified. *Klehr v. A.O. Smith Corp*., 521 U.S. 179, 194-95, 117 S. Ct. 1984, 1993, 138 L. Ed. 2d 373 (1997). Tolling because of fraudulent concealment requires proof that the plaintiff had neither actual nor constructive notice of the facts constituting its claims for relief. *Volk v. D.A. Davidson & Co*., 816 F.2d 1406, 1413 (9th Cir. 1987). A plaintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the fraud. *Pincay v. Andrews*, 238 F.3d 1106, 1110 (9th Cir. 2001).

STOI knew, contemporaneously with every transaction at issue in this case, of facts that would have led to discovery of the "schemes" underlying the RICO claims it now asserts. The Board of Directors simply had to do its job. Certainly, Shawn Yanity's and Jody Soholt's testimony[13] proves the Tribe knew the Tribal Officers operated the smoke shop at the Tribe expense. Yanity knew, at the time of its ICH loan, that STOI paid more for the methadone clinic loan than was "commercially available" (even though STOI has

[12] Nelson Declaration, Exhibits 2 and 3 (Dkts #299, 300).

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presented no evidence to support this argument). Finally, STOI received reams of information about the value of the real estate it was buying before it closed any of these twenty-two transactions. Yet, with every transaction, the STOI board closed its eyes and ears. It failed to ask questions. It failed to investigate. This evidence weighs against tolling the statute of limitations on the RICO claims. As such, the Court should dismiss the Second, Third and Fourth claims.

B. RICO DOES NOT PROVIDE AN AVAILABLE REMEDY TO STOI.

Ninth Circuit law is clear. Where a governmental entity is acting in *parens patriae*, enforcing the laws or promoting the general welfare of its citizens, it cannot prove, "harm to its business or property." Therefore, it lacks standing to bring a RICO claim. *Canyon County v. Syngenta Seeds, Inc*., 519 F.3d 969 at 976 (9th Cir. 2008), discussed earlier.[14]

The evidence establishes STOI's role in promoting the general welfare of its citizens. STOI's financial records demonstrate its growth as a governmental entity. In 2002, (before it began its economic development program) STOI's revenue from all sources (principally government grants) was a mere $6 million. That year, it spent $5.9 million on core governmental functions such as general government, natural resource management, health care, social services, housing and education.[15] For the period ending September 30, 2008 (the last fiscal year before the Tribe took over the tobacco shop), revenue had mushroomed to $26.8 million, with $25.6 million spent on core governmental functions such as general

[13] See, *supra*, page 4.
[14] Nelson Memorandum in Support of Motion for Summary Judgment, Dkt #296 at ¶9.
[15] See, STOI Audited Financial Statement for period ending September 30, 2002. Attached to Shafer Supp. Dec. as Exhibit 7 at page 3.

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government, natural resources management, health, social services, housing, education, methadone clinic, alpaca ranch and behavioral health.[16]

The 2008 audit report does not include the revenue contribution from the Angel of the Winds Casino. That separate audited financial statement shows operating income of $3.6 million for the year ending September 30, 2008, with "transfers to Stillaguamish Tribe" of $1.7 million.[17]

All of the transactions giving rise to this action enhanced the Tribe's ability to deliver core governmental services to its citizens. They enabled STOI to increase its social services budget fivefold in only six years. The TAC seeks a remedy for indirect injury to its operations. This is conceptually indistinguishable from the circumstances in *Canyon County*. As the Ninth Circuit instructed in that case, such indirect injury is not within the scope of RICO. Whatever other claims STOI may bring, RICO claims are not among them.

The cases on which STOI relies (Opposition Memorandum, Dkt #341, footnote 35) were commercial cases. They are inapposite. STOI's reliance on them misses the central point of the *Canyon County* decision. The focus here is whether STOI, as a government, was acting in its role as such, and not as a consumer. STOI, in occupying its government role, cannot demonstrate injury to business or property. According to *Canyon County*, the court should dismiss the RICO claims.

C. THE TORT CLAIMS ARE ALL TIME BARRED.

Each of the tort claims alleged in the seventh, ninth, tenth and eleventh causes of action, are governed by the three year statute of limitations. The claims accrue when STOI discovered, or should have discovered, them. For all the reasons stated in Part II (A) above,

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[16] See, STOI Audited General Financial Statement for period ending September 30, 2008, attached to Shafer Supp. Dec. as Exhibit 8 at page 7.
[17] Shafer Supp. Dec., Exhibit 9 at page 3.

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STOI knew, or on the exercise of reasonable diligence would have known, about each of the claims stated. As such, claims based on any transaction occurring before February 25, 2007 are time barred.

III. CONCLUSION

For all the reasons stated in its memorandum in support of their motion for summary judgment, and for the additional reasons stated above and in Chapman's Memorandum and Reply, this case should go no further. The court should dismiss it with prejudice.

Dated this 24th day of August, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the date below I electronically filed the foregoing REPLY and the related SUPPLEMENTAL DECLARATION OF ANDREW D. SHAFER with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the documents to the following non-CM/ECF participants:

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SIGNED and DATED this 24th day of August, 2012.

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